No. 7017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOO GAN TZE,
Appellant,

vs.

EDWARD L. HAFF, as Acting Commissioner of Immigration of the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

I. M. PECKHAM,
United States Attorney,

R. B. MCMILLAN,
Asst. United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
United States Immigration Service,
on the Brief.

Parker Printing Company, 545 Sansome Street, San Francisco.

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STATEMENT OF THE CASE.

This appeal is from an order of the District Court for the Northern District of California denying appellant's petition for a writ of habeas corpus (T. 59).

FACTS OF THE CASE.

Appellant is a male Chinese, twenty-six years of age (T. 17). He was denied admission into the United States by the immigration authorities for failure to

establish to their satisfaction that he is the son of Hoo Loy, an American citizen (T. 18).

ARGUMENT.

I. THE COURT BELOW PROPERLY DENIED THE PETITION FOR WRIT OF HABEAS CORPUS.

Appellant first contends that the District Court erred in denying the writ upon a consideration merely of the petition and of the respondent's excerpts from the immigration record, and that appellant was entitled to have his claim of American citizenship heard in the District Court.

(a) Appellee was not entitled to a judicial hearing on his claim of American citizenship.

Nothing is better settled than that in an exclusion case as distinguished from an expulsion case the applicant is not entitled to a judicial hearing upon his claim of American citizenship.

In

Ng Fung Ho, et al. v. White, 259 U. S. 276,

which appellant cites, the Court said at page 282:

> "If at the time of arrest they had been in legal contemplation *without the borders of the United States, seeking entry,* the mere fact that they claimed to be citizens would *not* have entitled them under the Constitution to a judicial hearing. United States vs. Ju Toy, 198 U. S. 253; Tang Tun vs. Edsell, 223 U. S. 673."

In

Quon Quon Poy v. Johnson, 273 U. S. 352 at 358,

the Supreme Court said:

> "It is clear, however, in the light of the previous decisions of this Court, that when the petitioner, who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing; and that unless it appeared that the Departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of habeas corpus without proceeding further." (Citing cases).

Hence the question on habeas corpus in a case of this character is simply whether denial of a fair hearing or abuse of discretion by the immigration authorities was shown.

(b) The petition was insufficient to justify or require the issuance of a writ of habeas corpus.

> "In view of the function of a petition for the writ of habeas corpus in a case heard upon the petition and notice, or order to show cause, a formal demurrer is generally regarded as unnecessary and improper, as it is the duty of the court

to deny the application if the petition does not state a case entitling the petitioner to the writ."

29 *Corpus Juris* 147, and cases cited.

In

Horn v. Mitchell, 223 Fed. 549, 550,

the Court said:

"I greatly doubt whether a formal demurrer is necessary or proper in a case heard upon a petition and an order to show cause why the writ should not issue. In view of Revised Statutes, Section 755, it is, I think, sufficient if the respondent orally demurs or, what amounts to the same thing, suggests to the court that the petition does not state a case entitling the petitioner to the writ. This was apparently the course followed in Leo M. Frank's case, 237 U. S. 309."

In

Frank v. Mangum, 237 U. S. 309 at 332,

(referred to above as Leo M. Frank's case) the Supreme Court said:

"The District Court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. * * * Under Section 755 Revised Statutes, it was the duty of the court to refuse the writ if it appears from the petition itself that appellant was not entitled to it."

Accord:

Ex parte Terry, 128 U. S. 289, 301;

Ex parte Milligan, 4 Wall. 2, 110;
Ex parte Watkins, 3 Pet. 193, 201.

In

Hom Moon Ong v. Nagle (C. C. A. 9), 32 F. (2d) 470 at 471,

on an appeal from an order of the District Court denying the petition for writ *without issuing an order to show cause,* this Court said:

> "Obviously the court below was of the opinion that the petition presented no ground either for the issuance of a writ or an order to show cause. This court applied the rule of the statute in a similar case in Erickson vs. Hodges, 179 Fed. 177."

In

Chin Lim v. Nagle (C. C. A. 9), 38 F. (2d) 474, this Court said:

> "The petition therefore fails to show that the applicant was denied a fair hearing, and for that reason neither justifies nor requires the issuance of a writ of habeas corpus."

From the foregoing it is clear that if the petition failed to show that the immigration authorities had denied appellant a fair hearing or acted in some unlawful or improper way or abused their discretion, issuance of a writ of habeas corpus was neither justified nor required.

The petition in the case at bar (T. 1 to 7, inclusive) was filed April 8, 1932. It alleged that appellant had been denied admission into the United States by the Board of Special Inquiry and the Secretary of Labor (T. 2, 3), that appellant is the blood son of Hoo Loy, a native born citizen (T. 3), that the excluding decision is based on discrepancies in the testimony which "are not serious" and which "do not relate to material matters" (T. 4), that the records of the Immigration Bureau "are conclusively favorable to the detained," that the detained has been consistently mentioned by members of the family as the blood son of Hoo Loy since 1911 (T. 4, 5), and

> "that your petitioner has not had time, owing to the sudden notice of the order of deportation and the proximity of the sailing of the steamship 'President McKinley' to secure copies and excerpts from the immigration records of the Department of Labor, with the exception of exhibits hereto attached; *that as soon as possible, your petitioner will present the same to the Court for its consideration.*" (T. 5)

There was annexed to the petition as Exhibit "A" copy of a *supplemental* brief filed before the Secretary of Labor in appellant's behalf (T. 8 to 12, inclusive) and as Exhibit "B" copy of a *supplemental* summary of the Board of Special Inquiry on reopening (T. 12 to 15, inclusive). No copy of the summary in chief of the Board of Special Inquiry was filed, nor was there filed the decision of the Secretary of Labor on appeal.

The mere allegation in the petition that appellant is a citizen of the United States was, of course, insufficient to justify or require intervention by the Court.

United States v. Ju Toy, 198 U. S. 253.

Unless it appeared that the executive officers had either denied a fair hearing or abused their discretion the inquiry could proceed no farther.

Quon Quon Poy v. Johnson, supra;
Tang Tun v. Edsell, 223 U. S. 673.

The petition itself alleges that the excluding decision was based upon discrepancies in the testimony (T. 4). The allegations that the executive authorities had abused their discretion and that the discrepancies were not serious or material were of course mere averments of conclusions of law and were necessarily inadequate.

Craemer v. Washington State, 168 U. S. 124 at 129;
Whitten v. Tomlinson, 160 U. S. 231;
Kohl v. Lehlback, 160 U. S. 293.

It would be necessary to consider the testimony on the subject matter of the discrepancies before it could be said that in excluding the appellant because of such discrepancies the immigration authorities had abused their discretion. This was in fact done, upon the respondent's showing on the order to show cause.

(c) The procedure in the court below was proper.

Although more than three months elapsed after the filing of the petition before the matter came on for

hearing, appellant did not at any time amend or supplement his petition, or file "copies and excerpts from the immigration record," as he had assured the Court in his petition he would do. *Appellee* (respondent below) however filed his "excerpts of testimony from the original immigration record" (T. 17 to 56, inclusive), setting forth *in haec verba* the contradictory testimony on fourteen points, which contradictory testimony constituted the reasons for the excluding decision. The matter was thereupon *submitted* to the Court for decision *by consent of counsel* (T. 58 and 59).

Appellant suggests that the Court should have called for the complete immigration record. He made no such suggestion at any time to the Court below. He chose to submit his case upon the petition and the respondent's excerpts of testimony from the record. Certainly he may not now complain of a procedure to which he expressly assented.

> *Kamiyama v. Carr* (C. C. A. 9), 44 F. (2d) 503, and cases cited therein.

Let us now consider Rule 50 of the District Court for the Northern District of California, a portion of which Rule is set out in the appendix to appellant's brief.

As pointed out in that Rule, it is well established that a petition for writ of habeas corpus must set forth a copy of the record of the proceedings attacked or the essential portions thereof. The Rule requires

that in immigration cases the findings of the Board of Special Inquiry and of the Secretary of Labor, "and such other portions of the record as petitioner relies on to establish his right to a writ" are to be filed by the petitioner. The Rule further provides for the setting up by way of amendment to the petition of such essential portions of the record as might not be available at the time of filing the original petition.

Appellant in his brief insinuates that he "could not obtain the production of the necessary testimony and documents in support of his contention" (appellant's brief, p. 6). Assuming that this may have been so at the time the petition was filed, owing to lack of time, certainly during the several months in which the matter remained pending in the Court below he could have amended or supplemented his petition, as he had promised in the petition itself he would do. The record was at all times available to him. Rule 5 of the Chinese Rules of the Department of Labor, as amended, provides in Paragraph I, Subdivision 1, as follows:

> "After the excluding decision of the Board of Special Inquiry is made the attorney of record, if any, shall be permitted to examine the record and exhibits and, upon request, shall be furnished with a copy of the testimony, summary and motions."

Appellant did not amend or supplement his petition. And although "he ought not to hope that the return of his custodian would come to the aid of his petition" (*Erickson v. Hodges* (C. C. A. 9), 179 Fed. 177 at

178), nevertheless the respondent did in fact file the essential portions of the record necessary for the Court to determine whether or not the excluding decision was arbitrary and an abuse of discretion. Appellee (respondent below) construed Rule 50 of the District Court as contemplating that the respondent also should set up as his showing upon the order to show cause and for the convenience of the Court the particular and specific portions of the immigration record upon which he relies to support the excluding decision. Hence appellee filed excerpts of the record, embracing the contradictory testimony particularly relied upon as the basis for the adverse decision of the Board and the Secretary of Labor. The Court then had before it the petition based upon an alleged abuse of discretion in that the discrepancies upon which the excluding decision was based were "not serious" and "do not relate to material matters" (T. 4), and when the appellee (respondent) filed his excerpts from the testimony as his showing upon the order to show cause, the Court then also had before it the testimony showing the discrepancies. The question then was, of course, simply whether or not by rejecting appellant's claim because of these discrepancies the Board and the Secretary of Labor had acted arbitrarily and abused their discretion. In other words, the testimony showing the discrepancies was then before the Court and the Court was in a position to determine the only question open to it, viz., the sufficiency of those discrepancies to sustain the excluding decision. Counsel for the appellant submitted the matter upon that basis and the record

shows that the situation was so considered by all concerned.

The cause of the detention being shown by the petition to be an excluding decision based upon "discrepancies", and these discrepancies having been set forth verbatim by respondent, obviously respondent's excerpts of testimony was, regardless of form, in substance and effect a return to the order to show cause.

The portion of Rule 50 which appellant now seeks to invoke is as follows:

> "In the event that it appears to the Court that the petition for the writ does not in fact furnish sufficient information, the Court may, upon its own motion, call for the original record. The Immigration Service will not be requested to produce the original record except under these circumstances. Counsel should discontinue their practice of stating in the petition that they stipulate that the record be considered part of the petition, except where the facts pleaded show that material portions of the record are not in fact available."

It is clear therefore that under the Rule it was not contemplated that whenever the petitioner should neglect to comply with the Rule the Court would upon its own motion require the respondent to supply the immigration record. It is obvious that this was to be done only when the petitioner was *unable* to comply with the rule and not when the petitioner was simply *unwilling* to comply with the Rule.

This Court has already had occasion to consider this Rule in

Chin Lim v. Nagle (C. C. A. 9), 38 F. (2d) 474,

wherein this Court said:

> "This order is in accordance with the general principles governing proceedings on habeas corpus, as stated therein, and was adopted to correct the lax practice theretofore permitted in such cases, which the petitioner now seeks to invoke."

It is obvious that the situation of which appellant complains was entirely due to his own neglect to comply with the Rule of the Court and with the requirements of proper habeas corpus practice, that he acquiesced in the procedure which was followed in the Court below, and that there was nothing prejudicial to him in that procedure.

(d) The decision of the administrative tribunals was neither arbitrary nor capricious.

Here again we have one of the cases which inundate this Court at every term, involving simply a question of fact already passed upon by the Board of Special Inquiry and the Secretary of Labor, whose decisions are expressly made final by the Statute (8 U. S. C. A. § 153).

The question before the Court, of course, is not whether the decision of those tribunals is right or wrong but simply whether their decision is so arbi-

trary and capricious as to amount to a denial of due process of law.

Tisi v. Tod, 264 U. S. 131 at 133;
Chin Yow v. United States, 208 U. S. 8, 13;
Nishimura Ekiu v. United States, 142 U. S. 651 at 660;
Louie Lung Gooey v. Nagle (C. C. A. 9), 49 F. (2d) 1016.

"The question before us however is not one of reconciling discrepancies and of arriving at the ultimate truth by weighing the evidence before the Board, but merely to determine whether or not the rejection of appellant's testimony has been so arbitrary and unreasonable as to constitute a denial of a fair hearing."

Quock Hoy Ming, et al. v. Nagle (C. C. A. 9), 54 F. (2d) 875.

In

Chin Wing v. Nagle (C. C. A. 9), 55 F. (2d) 609,

this Court said:

"Reasonable men might easily disagree as to the probative effect of these discrepancies. While there is possibility of such disagreement among reasonable men, the findings of administrative boards of the kind that passed upon the appellant's case will not be disturbed."

Appellee does not propose to discuss all fourteen of the discrepancies in this case. A consideration of a

few of the more striking ones will show that the excluding decision is neither arbitrary nor capricious.

(a) The testimony of the members of appellant's alleged family is that his alleged paternal grandfather always lived in appellant's house and died there about 1923, and that at the time of his death appellant's alleged parents, brothers and sister were in the United States (T. 22 to 25, 28).

Appellant testified at first (T. 26) that he never saw either of his grandparents and regarding his grandfather's death that "I think he died when I was three or four years old" (appellant is now said to be twenty-six years old—T. 17). Later appellant said his grandfather "died some ten years ago" (T. 26). He testified that his mother, his sister and his brothers Ging Pon and Gwing Sen *were living in his house at the time his alleged grandfather died and that his sister and his two brothers attended the funeral* (T. 27).

(b) All members of appellant's alleged family testified that his alleged aunt Yee Shee now lives in their home village (T. 31, 32 and 34).

Appellant testified that the alleged aunt *"died a long time ago"* and that he has *no recollection of ever having seen her* (T. 33).

The village is said to consist of only fifteen houses (T. 26). Appellant claims to have lived there all his life (T. 20) and to have taken his meals at his uncle's house at least from 1923 to 1927 (T. 42).

(c) Appellant's alleged brothers Hoo Ging Pon and Hoo Gwing Sen, who have made quite recent trips to China, testified that their uncle has seven sons living in their home village, the youngest being Hoo Way Hung, about seven years old (T. 36, 37, 38).

Appellant testified that his alleged uncle has only *six* sons, and in describing the alleged uncle's family he makes no mention of Hoo Way Hung (T. 36).

(d) Appellant's alleged brother Hoo Ging Pon testified that while he was in China from 1923 to 1927 he always slept in his uncle's house, that he never slept in the same house in which appellant slept, and that during the entire period of his visit appellant lived in his house alone (T. 38, 39 and 40).

Appellant testified that during that period this alleged brother *lived and slept in the same house with him* (T. 41, 42).

(e) Appellant testified that Hoo Ging Pon went with him on the annual visits to the grandparents' graves each year while this alleged brother was last in China (T. 43).

Hoo Ging Pon testified that he did not make any such visits to the graves (T. 42 and 43).

(f) Appellant testified that he was married on December 21, 1929, and that his oldest alleged brother was married before he himself married (T. 53).

This alleged brother testified that appellant was married first and that he himself was still in the

United States when appellant married (T. 53 and 54). This alleged brother returned to China in February, 1929 (T. 18).

No argument is needed to show that the foregoing conflicts relate to vital family matters of which a member of the family could not be ignorant.

> "The discrepancies to which we have referred, and other minor ones, did not relate to unimportant objects or incidents outside of the family and home which may not be observed at all or are soon forgotten. They related to facts connected with the immediate home life of the family which were necessarily within the personal knowledge of the several witnesses, if the claim of relationship in fact existed."
>
> *Weedin v. Jew Shuck Kwong* (C. C. A. 9), 33 F. (2d) 287 at 288;
>
> *Lee Get Nuey v. Nagle* (C. C. A. 9), 53 (2d) 208.

When such discrepancies appear, the executive decision will not be disturbed although the testimony be otherwise in complete accord.

> *Weedin v. Yee Wing Soon* (C. C. A. 9), 48 F. (2d) 36;
>
> *Lee Get Nuey v. Nagle* (C. C. A. 9), 53 F. (2d) 208;
>
> *Lee Foo v. Nagle* (C. C. A. 9), 58 F. (2d) 764;
>
> *Weedin v. Chin Share Jung* (C. C. A. 9), No. 6890, Jan. 9, 1933;
>
> *Chin Wing v. Nagle,* supra.

These discrepancies are of the same general sort as those involved in the case of

Wong Hon Ping v. Haff, No. 7033, decided by this Court on February 20, 1933;

but are much more flagrant.

Appellant, an adult Chinese aged twenty-six years, claiming to have lived all his life in the small village of only fifteen houses, is so hopelessly in conflict with the testimony of all members of the family to which he claims to belong on the foregoing and other fundamental matters of family relationships and history that argument on the facts is entirely superfluous.

We respectfully submit that the order appealed from should be affirmed.

I. M. Peckham,
United States Attorney,

R. B. McMillan,
Asst. United States Attorney,
Attorneys for Appellee.

Arthur J. Phelan,
United States Immigration Service,
on the Brief.